UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERTO GONZALES BARQUERA, JR., Petitioner-Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents-Appellees,	No. 21035

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

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ALBERTO GONZALES BARQUERA, JR., Petitioner-Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents-Appellees,	No. 21035

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On July 10, 1961, a judgment of conviction was entered against petitioner for the crimes of sale and

conspiracy to sell narcotics. On July 11, 1961, a separate judgment of conviction was entered against petitioner for the crime of possession of a narcotic. Petitioner appealed both convictions, and both of the convictions were affirmed. See People v. Barquera, 207 Cal.App.2d 725 and People v. Barquera, 208 Cal.App.2d 104.

In December of 1964, petitioner filed in the California Supreme Court an application for a writ of habeas corpus. The grounds set forth by petitioner as a basis for relief were substantially similar to those set forth in the instant proceeding with the exception of the charge of police brutality which has been omitted. The California Supreme Court denied this petition without opinion. A copy of this petition is attached as "Appendix A."

B. Proceedings in the Federal Courts.

In May of 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 26). Judge Sweigert of that Court denied the petition for writ of habeas corpus on December 20, 1965 (CT 37). On April 22, 1966, an order was issued granting appellant's application for a certificate of probable cause and allowing appellant to appeal in forma pauperis (CT 43).

SUMMARY OF APPELLEE'S ARGUMENT

A. The July 10, 1961, conviction

1. The question of sufficiency of the evidence should be disregarded in this proceeding.

2. The question of competency of counsel should be disregarded in this proceeding.

3. Appellant is precluded from raising the question of advice as to constitutional rights in relation to alleged extra-judicial statements.

4. Appellant's contention that he was improperly denied the right of discovery during the preliminary hearing does not raise a federal issue.

B. The July 11, 1961, conviction

The appellant is entitled to no relief under the doctrine of McNally v. Hill, 293 U.S. 131 (1934).

ARGUMENT

A. THE JULY 10, 1961, CONVICTIONS

I. THE QUESTION OF SUFFICIENCY OF THE EVIDENCE SHOULD BE DISREGARDED IN THIS PROCEEDING.

Appellant complains that the evidence was insufficient to support the verdict. He apparently is arguing, as he did on appeal, that there was a gap in the chain of possession of the heroin introduced at the trial. The facts set forth below, as discussed in the California District Court's opinion, refute appellant's contention.

People's Exhibit One was not received into evidence. As to Exhibits Two through Five, however, a chain of possession was clearly established. The police agent who purchased the heroin from appellant turned the heroin stored in balloons over to a chemist in sealed envelopes. The chemist opened the envelopes and determined that each balloon contained heroin. The chemist thereupon stored the heroin in vials, placed the vials in the envelopes, resealed the envelopes and stored them in a safe of the California State Building in Los Angeles where they remained until the preliminary hearing. At the conclusion of the preliminary hearing, the heroin stored in plastic vials was received by the municipal court. The chemist did not see the exhibits again until he testified at the trial.

During the chemist's testimony at the trial, it became apparent that the vial from the envelope of Exhibit One had been misplaced into the envelope of Exhibit Four, which at the time of trial contained two vials rather than one. Since the chemist testified that each vial contained heroin, the California District Court of Appeal correctly held that any mix-up of the fungible powder itself could not have prejudiced appellant. The court further held that the prosecution had reasonably established a continuous chain of custody from the date the contraband was received from appellant until its admission into evidence at trial.

See People v. Barquera, 208 Cal.App.2d 104 (1962).

Appellant also complains that his conviction of conspiracy to sell narcotics was not proved. The record flatly disputes this contention. Relevant portions of the trial transcript are attached as "Appendix B." Appellant was charged as taking part in three overt acts establishing the conspiracy, number three, number six and number seven. With respect to overt act number three, agent Cota testified that he met appellant's co-defendant Gomez on March 3, 1961 (RT 146). Agent Cota asked Gomez to obtain some heroin (RT 146-147) and Gomez said that he could get a quarter-ounce, but that Cota would have to wait for appellant (RT 147). Appellant appeared shortly thereafter and engaged in a conversation with Gomez. During this conversation appellant was looking at Agent Cota who was waiting in a nearby car (RT 147-148). Ultimately Cota gave appellant seventy dollars to purchase heroin, which appellant did. The evidence with respect to overt acts six and seven is similar to the foregoing (RT 175-177). Obviously, then, appellant's charge that the conspiracy was not proved is sham.

Moreover, in order for habeas corpus to lie in respect to sufficiency of the evidence, there must be an utter lack of evidence which would render the conviction a violation of due process. Buchanan v. McGee, 290 F.2d 711

(9th Cir. 1961). This is hardly the present case.

II. THE QUESTION OF COMPETENCY OF COUNSEL SHOULD BE DISREGARDED IN THIS PROCEEDING.

Appellant urges that his counsel was ineffective. He does not point to one fact upon which this assertion is based, and this allegation was not raised on appeal. Appellee assumes that appellant is urging that he should not have been tried jointly with the co-defendants for this argument was made in his petition to the California Supreme Court, although in that court, as in the instant case, no facts were alleged in respect to effectiveness of counsel upon which appellant would have his conviction overturned. Under California law a joint trial was proper, as the crimes charged generally involved the same defendants and the commission of each crime involved common elements. People v. Chapman, 52 Cal.2d 95 (1959).

In asserting this position appellant stated the following:

> "While it will be conceded that as whole [sic] defense counsel defended the case rather well, she grossly erred in allowing petitioner to be tried jointly when the various counts of the information charged distinct and separate offenses not related to one another in any way or form."

Since appellant has failed to allege any facts to support his

contention that he was denied effective aid of counsel because of the joint trial in the State courts, he has failed to exhaust available California remedies and should be precluded from raising this issue in the Federal courts. Conway v. Wilson, Civil No. 20470 (9th Cir. October 28, 1966).

In any event, there is no merit to this contention of appellant. The question of the competency of counsel is not reviewable on habeas corpus proceedings in the absence of such a showing of incompetence as to make the trial a farce or a mockery of justice. Palakiko v. Harper, 209 F.2d 75 (9th Cir. 1953). Hurst v. California, 211 F.Supp. 387 (N.D. Cal. N.D. 1962). That appellant's trial was not a farce or mockery of justice is apparent from his concession that defense counsel presented his case rather well.

III. APPELLANT IS PRECLUDED FROM RAISING THE QUESTION OF ADVICE AS TO CONSTITUTIONAL RIGHTS IN RELATION TO ALLEGED EXTRA-JUDICIAL STATEMENTS.

Appellant alleges that certain statements made by him which were received into evidence were taken in violation of his constitutional rights. This argument is primarily based upon Escobedo v. Illinois, 378 U.S. 478 (1964). Appellant's trial occurred in 1961. Inasmuch as the doctrine of Escobedo does not apply to cases in which

the trial began prior to June 22, 1964, there is no merit to appellant's claim that he was not advised in accordance with the doctrine of Escobedo. Johnson v. New Jersey, 384 U.S. 719 (1966).

IV. APPELLANT'S CONTENTION THAT HE WAS IMPROPERLY DENIED THE RIGHT OF DISCOVERY DURING THE PRELIMINARY HEARING DOES NOT RAISE A FEDERAL ISSUE.

Appellant complains that the magistrate at the preliminary hearing improperly denied defense counsel's motion that all notes utilized by the undercover agent be made available to the defendants. Significantly, these notes were made available at trial where they proved to be of little or no value for impeachment, the only purpose for which they could be used. See People v. Barquera, 208 Cal.App.2d 104 (1962). For this reason, appellee submits that the denial of the motion for discovery at the preliminary hearing raises no federal question. Further, even if it be assumed that a federal right is involved, the fact that the notes were made available at trial indicates compliance with the federal rule. Jencks v. United States, 353 U.S. 657 (1957).

B. THE JULY 11, 1961, CONVICTION

THE APPELLANT IS ENTITLED TO NO RELIEF UNDER THE DOCTRINE OF McNALLY v. HILL.

The District Court did not consider the contentions

urged in respect to the July 11, 1961, conviction since appellant's attack on his first conviction for which he is also confined was without merit. Appellee submits that this determination of the District Court was correct. McNally v. Hill, 293 U.S. 131 (1934). Nevertheless, appellee will briefly discuss appellant's arguments as they relate to the later conviction. Appellant first contends that he was the victim of an unlawful search and seizure. Secondly, he argues that the submission of the case on the transcript of the preliminary hearing was improper.

The following facts, as set forth in People v. Barquera, 207 Cal.App.2d 725 (1962), were personally known to the arresting officers at the time of appellant's arrest:

1. That appellant had been associating with persons connected with the narcotics traffic;
2. That appellant had suffered two prior narcotics convictions;
3. That a police department from another state had indicated that appellant was in the narcotics traffic;
4. That appellant began to run and appeared to throw something in his mouth when the officers identified themselves; and
5. That appellant dropped two objects.

Clearly, the foregoing facts were sufficient to establish probable cause for appellant's arrest, and the search incidental to this arrest was legal. Williams v. United States, 273 F.2d 781 (9th Cir. 1960, cert. den. 362 U.S. 951); see also, Beck v. Ohio, 379 U.S. 89 (1964).

With reference to the submission of the case on the basis of the transcript of the preliminary hearing, appellant himself admits that he agreed to such a procedure and objected in no way. Hence, there is no constitutional infirmity involved. Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus should be affirmed.

Dated November 23, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Michael Buzzell

MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 23, 1966.

Michael Buzzell

MICHAEL BUZZELL
Deputy Attorney General

A P P E N D I C E S

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NO._____

THE PEOPLE OF THE STATE OF CALIFORNIA

TO: The Presiding and Associate Justices
of the Above-Entitled Court.

PETITION FOR WRIT OF HABEAS CORPUS

Alberto Gonzales Barquera Jr.
Petitioner
In Propria Persona
Box No. A-67294
Tamal, California

(C O V E R)

EXHIBIT A

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Alberto Gonzales Barquera Jr., Petitioner, -against- Lawrence E. Wilson, as Warden of California State Prison, at San Quentin, California, Respondent.	SUPREME COURT Docket No._____

PETITION FOR A WRIT OF HABEAS CORPUS

Persuant to Section 1473 of the Penal Code.

TO: The Honorable Roger J. Traynor, as Chief Justice of the California State Supreme Court, and the Associate Justices.

The petition of Alberto Gonzales Barquera Jr. at present confined and restrained of his liberties by the respondent Warden by virtue of Judgments of conviction which are as it will be shown at infra void and without any effect in Law and force respectfully shows as follows:

GENERAL STATEMENT

The District Attorney of the County of Los Angeles, by information No. 292580 duly filed in the California State Superior Court, on January 31, 1961 charged your petitioner with a violation of Sec. 11500 of the California Health and Safety Code, to wit: Possession of a Narcotic, i.e., "Heroin", and further

with a previous violation of Sec. 11500 of the California Health and Safety Code. Cl. Tr. folio 58 - 59.

Further, the District Attorney of Los Angeles County, filed on May 3rd, 1961, in the Los Angeles County Superior Court, information No. 297919, Charging in its 6 counts, the following offenses:

Count I one Salvador M. Gomez and Francisco Lopez, with violation of Sec. 11501 of the California Health and Safety Code.

Count II one Salvador M. Gomez and Rigoberto Gomez, with violation of Sec. 11501 of the California Health and Safety Code.

Count III one Salvador M. Gomez and Alberto (Kolo) Barquera Jr., with violation of Sec. 11501 of the California Health and Safety Code.

Count IV one Salvador M. Gomez and Vera Caballero, with violation of Sec. 11501 of the California Health and Safety Code.

Count V one Salvador M. Gomez and Alberto Barquera Jr., with violation of Sec. 11501 of the California Health and Safety Code.

Count VI with seven (7) overt acts of Conspiracy to violate Sec. 11501 of the Health and Safety Code, in violation of Sec. 182 Penal Code.

Significantly enough the third, sixth and seventh overt acts of the 6th count of the information merely states:

Overt act no. 3 "That on March 3, 1961 defendants Alberto Barquera Jr., and Salvador M. Gomez, did meet and had a conversation," and the

Overt act no. 6 "That on March 21, 1961, defendants Alberto Barquera Jr., and Salvador M. Gomez, did meet and had a conversation" while

Overt act No. 7, alleges:

"That on March 21, 1961, defendants Alberto Barquer Jr., and Salvador M. Gomez, did leave the 700th Block of East 12th St. in a motor vehicle and returned in the vehicle together, 15 minutes later.

and said information further charges as with regards to your petitioner with a previous felony conviction for violating Sec. 11500 of the California Health and Safety Code. Cl. Tr. folio 1 - 1-.

On the possession charge, Sec. 11500 Health and Safety Code, the record at Cl. Tr. folio 66, shows that by stipulation, a jury trial was waived and the cause submitted to the Court, (Superior Court of the County of Los Angeles, Dept. 110, thereof, the Hon. Joseph L. Call, J.P.) upon the Municipal Court transcription information No. 292580.

While on information No. 297919, the cause was brought to trial in the California State Superior Court, Dept. 110 thereof, the Hon. Joseph L. Call, J.P., a jury trial was likewise waived, and defendants found guilty as charged by the Court. Cl. Tr.

Sentences of confinement in State Prison for terms as prescribed by law, were duly imposed, to run concurrent with any other sentences. Cl. Tr. folios 14 on information No. 297919 and Cl. Tr. folio 67 on information No. 292580.

Notices of Appeal to the California District Court of Appeals, Second Appellate District were duly filed, and on September 20, 196 in Case No. 7923, the possession charge, that Court, affirmed the Judgment of Conviction, as it also did in Case No. 7922, on October 1, 1962, the sales and conspiracy charges.

No application for a hearing in this Court has ever made, nor was the convictions attacked collateraly in any Court of the United States or California Jurisdiction.

STATEMENT OF FACTS

Since this petition alleges the invalidity of both judgment of conviction, although separate and distinct, yet closely related, we shall deal with our narrative of the facts and arguments in Law in that order.

A. The facts concerning information No. 292560.

By stipulation with defense Counsel, it was introduced in the record of the Preliminary hearing, (the matter was submitted to the Superior Court on that transcript) that one W. G. Penprase, is a qualified forensic expert, employed by the Los Angeles Police Department, and that the evidence introduced in Court is heroin. T.R. 2:12 3:18. Since at no time did the defense challenge this fact, we need not be concerned with it.

H. J. Virgin, testifying for the prosecution, testified as follows:

That he is a police sergeant for the City of Los Angeles, attached to the Narcotic Division, T.R. 4:24 - 26, that on January 3, 1961, he arrested the petitioner, T.R. 5:5 - 8, at 5444 Hunting Drive, T.R. 5:12, that prior to such arrest he had some knowledge concerning the defendant, T.R. 5:20 - 21, having investigated your petitioner for approximately two years, having known him to be in company with many large-time narcotic peddlers. T.R. 6:5 - 8. Defense Counsel's objection to this line of questioning is overruled by the Court, T.R. 6:9 - 11, and the witness continues by naming one Sabas

Apadocia, one Salvador Gomez, and goes in detail as to these men's criminal activities and record T.R. 6:12 - 7:5 and also that he had a letter from the El Paso (Texas) Police Department, which suspected that petitioner was engaged in - - - T.R. 7:5 - 7 and that prior to the January 3, 1961, arrest, he checked petitioner's record more than once, and that petitioner had two prior narcotic convictions, and that he talked with him concerning his narcotic activities, T.R. 9:3 - 15, that immediately prior to his arrest on January 3, 1961, he first observed the defendant's car parked in the vicinity of Ord and Newhigh, that he drove around the block, where he observed petitioner talking to a person that he knows as Tommy Bustos, who was convicted of narcotics, and is selling narcotics on the street, that ten minutes later, petitioner went back to his car and drove to 5444 Hunting Drive, where he parked his car in the rear of that address and went to a storeroom underneath the house next door, T.R. 9:18 - 10:4, that he observed petitioner putting his hand and shoulder and part of his head in the storeroom, then going into the house, staying there for about 10 - 15 minutes, came out again, and went directly to the storeroom again, at which time, the witness and his partner, called him by his nickname of "Nolo", T.R. 10:5 - 16, that as his partner called him by name, the defendant threw something toward his mouth, and as he did so two objects fell to the ground directly at his feet, and that then the defendant turned and ran, tripped on some stairs, and as he fell, the witness and his partner seized him. T.R. 10:17 - 23.

That he had a conversation with petitioner, at which were present his partner Sgt. Cumming, and while arrested petitioner allegedly admitted ownership of the stuff, (i.e., Narcotics) T.R. 12:9 - 16, that they took him to the Receiving Hospital to have

the "skinned knee" patched up. T.R. 12:17 - 19. On cross examination, the witness testified that he did not have an arrest warrant for him, T.R. 13:17, nor a warrant to search the house, and

"Did anybody search the house, to your knowledge?"

"No, we started to, but changed our minds."

"How far did you start?

"We got as far as the bathroom, and we found other ballons similar to these, measuring scpms - - - T.R. 13:20 - 26. and

"After we arrested the defendant, we took him to the living room and then into the bedroom. We sat him down in the bedroom, where we started to make the search. We did make the search, and then returned him by the same method going through the bedroom, to the living room and outside. We had no search warrant. T.R. 14:15 - 20.,

and:

Q. "You didn't find any narcotics in the house, did you?

A. No, ma'am.

Q. You went in there to look for narcotics, didn't you?

A. Principally, yes.

Q. Did you go over to the storeroom and look through it?

A. Yes ma'am. T.R. 15:5 - 1[illegible].

and:

"You say you have known this defendant for two years. Did you ever talk to him any time during that two years?

"Yes ma'am.

"Did he know who you were?

"Yes.

"Did you ever place him under arrest during that two years?

"No, just stopped hi.. for questioning on three or four occ-

"On those three or four occasions, did you also search him those times, too"?

"Yes, ma'am."

"Did you have a warrant on any one of those occasions"?

"No."

"On none of those occasions did you find any narcotics"?

"No." T.R. 17:25 - 18:16.

and:

"The reason you called for Nolo to stop was because you wanted to search him, didn't you"?

"I wanted to know wether he had any narcotics in his person." T.R. 21:8 - 11.

and:

"Isn't it a matter of fact that this man was kicked badly up and down his legs, and his mouth beaten until he was swollen quite badly at the time these pictures were taken"?

"No ma'am. He was taken to the Receiving Hospital. He had a contusion on one knee, which was slight. - - - T.R. 23:25 - 24:5.

and:

"Counsel, we had no reason to search the storeroom, in my opinion. T.R. 45:1 - 2.

THE FACTS CONCERNING INFORMATION NO. 297919.

This information charges five counts of violation of Sec. 11501 of the Health and Safety Code, and one count of conspiracy in violation of Sec. 182 P.C., the Sixth count of the information. Since in addition to the conspiracy count, the information deals with your petitioner only in counts three and five, petitioner shall

onfine himself only to an evidentiary review of these counts.

Quoting ad verbatim:

Q. Agent Cota, do you recall the date of March 3, 1961?

A. Yes, Sir, I do.

Q. And on that date did you see one of these defendants?

A. I saw two of the defendants.

Q. Which one did you see first?

A. Salvador Gomez.

Q. Where?

A. At the rear of the Texas Club in the parking lot.

Q. Did you have a conversation with him?

ne Court: Wait. He saw two of them, and he only gave the name of one.

y Mr. Wheatcroft: I take it you saw one first, is that right?

A. Yes, Sir.

Q. Then another one, later on?

A. Yes.

ne Court: Which one later on?

ne Witness: Alberto Barquera. T.R. 18:26 - 19:20.

nd:

Q. "Did you talk to Salvador Gomez about narcotics?

A. Yes, I did. T.R. 19:21 - 23.

nd:

Q. "do you recall the conversation?

A. Yes, I asked Salvador Gomez, "Chava, can I pick a half."

And he said, no "There isn't anything."

I said, "Well, can I at least pick up a quarter"?

I need it right away - - -

Salvador Gomez stated "Yes, you can pick up a quarter, but wait for Nolo, (petitioner's nickname). T.R. 20:1 - 12.

and:

"About five minutes later, after having the conversation with Salvador Gomez, I observed Alberto Barquera and Salvador Gomez holding a conversation in the center of the parking lot and looking in the direction of where I was in the State vehicle. I then observed Alberto Barquera walk toward the State vehicle enter, seating himself in front seat, the passenger side and stating, "Tony, how are you"? T.R. 20:23 - 21:5

and:

Q. "Calling your attention to March 21, 1961, do you recall that date, sir"?

A. "Yes, sir, I do."

Q. "Did you see one or more of the defendants on that date"?

A. "Yes, sir, I did."

Q. Which one?

A. I saw both defendants Alberto Barquera and Salvador Gomez. T.R. 33 - 24 - 34 - 6.

and:

I asked Barquera if it would be possible to pick up five pieces like we had talked about before.

He said: "Yes, just pay the money," He says: "I will have the stuff ready." T.R. 35:22 - 25.

Significantly the record shows that testimony as to each count was taken, the evidence pertaining to that count was introduced in evidence.

T.R. 11:1 - 3	Count I.
T.R. 17:23 - 25	Count II.
T.R. 23:5 - 7	Count III.
T.R. 32:26 - 33:3	Count IV.
T.R. 36:5 - 12	Count V.

Further, the record shows at T.R. 37:5 - 39:2 that the witness had a conversation with your petitioner, subsequent to March 21, 1961 during which conversation petitioner allegedly admitted ownership of the narcotics.

Another prosecution witness is William J. Arnold, a qualified forensic expert employed by the State Narcotics Bureau. On direct testimony, T.R. 121:14 - 123:13, the witness testifies in substance as follows:

> He identifies the five exhibits previously introduced in evidence and that they contained heroin, and goes into detail as to the proceedings from the time they were received by the agent until the time that they were produced in Court.

In cross examination, at T.R. 125, the witness is asked:

Q. "And were the contents the same as they are now, or similar"? T.R. 125:4.

A. No, ma'am, they were not. In some cases the plastic vials were not included within the exhibit. The powdery substance was merely in a rubber balloon, in which case I opened the balloon and removed the contents and placed the material in a plastic vial, if a plastic vial was not already present. T.R. 125:11.

and:

"To the best of my knowledge, People's 2 and 3 were not in the plastic vial when I first received them. T.R. 125:16 - 18

LEGAL CONTENTIONS

I. As to information No. 292580, the possession charge.

A. Evidence obtained by means of an illegal search and seizure.

B. Evidence obtained by police brutality.

C. Waiver of the right to a trial jury and submission on the preliminary hearing transcript prejudicail error.

II. As to information No. 297919, the sales charge.

A. Evidence insufficient to sustain a conviction.

B. No continuous chain of possession of the evidence was proven, but quite contrary there was prove that petitioner was the victim of harassment by narcotic officer for some two years.

C. Ineffective aid of Counsel.

D. No conspiracy charge proven.

E. Evidence obtained with the aid of an unreliable informer.

F. Evidence obtained by interrogation without Counsel.

POINT I

Evidence obtained as a result of an illegal search and seizure on information No. 292580. 11500

Where a defendant raises the issue of an illegal search and seizure, the factual test is not concerned with what evidence the search produced, but with the authority of the searching officers to make the search.

The record clearly establishes that for almost two years, your petitioner was the object of an intensive harrassment on the part of one Sgt. Virgil, attached to the Los Angeles Police Department

nd its Narcotic Bureau. Petitioner was stopped at frequent intervals uestioned and searched, and every movement of his, carefully watched. e are told that the Police Department had cause to believe that he as engaged in the traffic of narcotics. The fact remains, undisputed nd unchallenged that the authorities in the instant case, had ample pportunity to obtain a search warrant, if they felt that they had n their possession sufficient information to satisfy a magistrate hat there was "sufficient probable cause."

In Nick Alford Aguilar v. Texas, No. 548 October Term, 1963, nited States Supreme Court held by Mr. Justice Goldberg held:

> "In Ker v. California, 374 U.S. 23, We held that the Fourth Amendment proscriptions are enforced against the States through the Fourteenth Amendment," and that the standard of reasonableness is the same under the Fourth Fourteenth Amendments, although Ker involved a search without a warrant, that case must certainly be read as holding that the standards for obtaining a search warrant is the same under the Fourth and Fourteenth Amendments." an evaluation of the constitutionality of a search warrant should begin with the rule, that the informed and deliberate determinations of magistrate empowered to issue warrants . . .are to be preferred over the hurried action of officers . . . who may happen to make arrests.

In the instant case the officer openly and brazenly avows that ver a period of almost two years that he had your petitioner under onstant surveillance, he searched his person and premises several imes, always with a negative result and invariably without a search arrant United States v. Lefkowitz, 285 U.D. 452, 464. The reason or this rule go to the foundation of the Fourth Amendment a contrary ule "that the evidence sufficient to support a magistrate's disinerested determination to issue a search warrant will justify the fficers in making a search without a warrant would reduce the Fourth endment to a nullity and leave the peoples homes secure only in he discretion of police officers Johnson v. U.S. 333 U.S. 10.

Under such a rule "resort to warrants, would ultimately be discouraged."

Jones v. U.S. 362 U.S. 257, 270.

Thus, when a search is based upon a magistrate's rather than a police officer's determination of probable cause, the reviewing courts will accept evidence of a less "judicially - competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for the magistrate to conclude that the narcotics were probably present.

> "The point of the Fourteenth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inference which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. U.S. supra.

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the Court must still insist that the magistrate perform his "Neutral and detached" function and not serve merely as "a rubber stamp"for the police.

In Nathanson v. U.S. 290 U.S. 41, a warrant was issued upon the sworn allegation that the affiant "has cause to suspect" and does believe, that certain merchandises was in a specified location.

The Court noting that the affidavit "went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts," announced the following rule:

> "Under the Fourth Amendment, as officer may not properly issue a warrant to search a private

> dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation mere affirmance of belief or suspicion is not enough.

The Court in Giordenello v. U.S. 357 U.S. 480, applied this rule to an affidavit similar to that relied upon here. The Court announced the following guiding principles:

> "That the inferences from the facts which lead to the complaint must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
>
> Johnson v. U.S. 333 U.S. 10, 14.

The purpose of the complaint then, is to enable the appropriate magistrate - - - to determine whether the "probable cause" required to support a warrant exists. The magistrate must judge for himself to show probable cause. He should not accept without question the complaint is mere conclusion.

In the instant case "the mere conclusion" that petitioner was engaged in the traffic of narcotics was not even that of the affiant himself, it was that of an unidentified informant, and often vague related information.

The Fourth Amendment to the U.S. Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, . . .

It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit-a-crime.

Weeks v. U.S. 232 U.S. 383

Agnello v. U.S. 269 U.S. 20

This right to search and seize without a search warrant extend to things under the accused's immediate control.

Carroll v. U.S. 267 U.S. 132

Brinegar v. U.S. 338 U.S. 160

and to an extent depending on the circumstances of the case, to the place where he is arrested.

Agnello v. U.S. 269 U.S. 30

Marron v. U.S. 275 U.S. 192

United States v. Rabinowitz, 339 U.S. 56

The rule allowing searches is justified for example by the need to seize weapons and other things which might be used to assault an officer or to effectuate an escape.

Roberts v. Cassey, 36 App. 2d Supp. 767.

Fox v. Windenere Hotel Apt. Co. 30 Cal. App. 162.

People v. Vaughn, 65 Cal. App. 2d Supp. 844

United States v. Jeffers, 342 U.S. 48

Mapp v. Ohio, 367 U.S. 643

and in McDonald v. U.S. 335 U.S. 451, the Court held:

> "This is not a case where the officers, passing on the Street, hear a shout and a cry for help and demand entrance in the name of the law. They have been following petitioner, keeping him under surveillance for several months.

Where as here, officers are not responding to an emergency there must be compelling reasons to justify the absence of a search warrant.

POINT II

Evidence obtained by police brutality.

The record clearly establishes that immediately following the arrest and proceding the searchs, a scuffle ensued between petitioner and the arresting officers and that following such a scuffle, petitioner's premises were searched without a warrant and while arrested petitioner allegedly made some statements to the police officers.

In Danny Escobedo v. State of Illinois, U.S. Supreme Court No. 615, October Term 1963, the Court held:

> "It is well settled that the duty of Constitutional adjudication, resting upon this Court requires that the question whether the "Due Process Clause" of the 14th Amendment has been violated by admission into evidence of a coerced confession."
>
> Ashcraft v. Tennessee, 322 U.S. 143.

and we cannot escape the responsibility of making our own examination of the record.

Spano v. United States, 360 U.S. 315.

and:

"It cannot be doubted that placed in this position in which your petitioner was, the result was to produce upon his mind that fear that if he remained silent it would be considered an admission of guilt, and it cannot be conceived that the converse impression would not have also naturally arisen, that by obeying there was hope of removing the suspicion from himself."

Bram v. U.S. 168 U.S. 532

Ex parte Sullivan, 107 F. Supp. 514

Cannon 9 of the American Bar Association

Cannons of Professional Ethics.

Watts v. Indiana, 338 U.S. 49

and:

§ Wigmore on Evidence at pg. 309.

> "Any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer morally thereby. The inclination developes to rely mainly upon such evidence and to be satisfied with an incomplete investigation of the other sources. The excercise of power to extract answers begets a forgetfullness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there seems to be a right to the expected answer, that is to a confession of guilt. Thus the legitmate use grows into the unjust abuse, ultimately the innocent are jeopardized by the encroachments of a bad system.

POINT III

Waiver of the right to a Trial Jury and Submission on the Preliminary Hearing Transcript prejudicial error.

Although the record before us establishes that petitioner agreed to such a waiver of the right to a Jury Trial, and submission on the Preliminary Transcript, the record does not show any assent by petitioner to the submission on the transcript without cross examination or confrontation of the witnesses, and the record also fails to show any objection by petitioner to this procedure.

In Frederick Gray v. Wilson, No. 41890, U.S. District Court, Northern District of California, Southern Division, Mr. Alfonso J. Zirpoli, J.P., the Court held:

> "At the outset it should be noted that counsel have not cited any case where a federal court has specifically ruled that the right to cross examination and confrontation is embodied in the due process clause of the 14th Amendment. However the Supreme Court has held that procedural Due Process requires that a State Bar Association permit an applicant to

cross examine and confront the witnesses against him in an administrative hearing . . . Willner v. Committee on Character, 373 U.S. 96

If a State must accord the right to cross examination and confrontation in an administrative hearing, a fortiori it must accord such rights in a criminal trial. Moreover, the right to cross examine and confront is essential to a fair trial if the rules of procedure are to have as one of their objects the ascertainment of the truth.

Wigmore on Evidence Vol. 5, pg. 28, Sec. 1367.

The Court therefore holds that the right of the accused to ross examine and confront prosecution witnesses in a State Crim- al trial is guaranteed by the due process clause of the 14th endment.

The accused may however waive his right to cross examination d confrontation.

Diaz v. U.S. 223 U.S. 442.

Normally waiver is made by Counsel as to particular witnesses, nce as every trial lawyer knows, it is just as . . .

As a practical matter, a reviewing court cannot find a denial the Constitutional right to cross examine merely on the basis an error in trial tactics, unless such an error is so gross to constitute a denial of adequate and effective aid of Counsel.

Brubaker v. Dickson, 310 F. 2d 30

But there is a vast difference between questions of trial ctics and the complete submission of the issue of guilt or inno- nce on the cold record of a transcript.

Practically speaking, such submissions are often nothing more an a "slow plea of guilty" the waiver of cross examination by bmission on a preliminary transcript must be made by the accused

rather than any assembly. Anything to the contrary in:

Cruzado v. People of Puerto Rico, 210 F. 2d. 789

Suggesting a different conclusion is not controlling here in the light of:

Fay v. Noia, 372 U.S. 391.

The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458 - an intentional relinquishment or abandon out of a known right or privelege - furnishes the controlling standard.

Price v. Johnston, 334 U.S. 266, 291.

At all events we wish it clearly understood that the standard here put forth on the considered choice of petitioner.

Carnley v. Cochran, 369 U.S. 506

Moore v. Michigan, 355 U.S. 155

As to information No. 297919, on the sales charge.

POINT I

Insufficiency of the evidence, and lack of proof that the alleged evidence was not subject to being tampered with.

The record before us discloses that the police officer is the sole witness testifying to the alleged sale.

Sec. 1846 et subs. of the Code of Civil Procedure distinctly stipulates that:

> "The testimony of one witness who is entitled to full credit shall be sufficient to warrant a conviction."

It is of ut most importance to note that the code, does not state ". . .one witness," but one witness who is entitled to full credit.

at the officer's testimony in this case commands.

Aside from the fact that he is an officer of the law, his stimony as pertains to your petitioner is confused and even the lice chemist admits that the evidence was tampered with.

In Brubaker v. Dickson, 310 F. 2d. 30, 38, the Court held:

> "That often the critical factual inquiry relates to matters outside of the trial record."

The instant case presents just such a situation.

Five defendant's were tried jointly allegedly selling narcotics. e of them, Francisco Lopez, was the informer.

The record establishes that he received county money for his formation in addition to leniency in his sentence.

In Willson v. Superior Court, 46 Cal. 2d. 291, the Court held:

> "The reliability of the informer goes to the very heart of the concept of reasonable cause."

. Accordingly to justify reliance on the information received , is now firmly established in this State that the information st come from a reliable informant.

People v. Prewitt, 52 Cal. 2d. 330, 337

Willson v. Superior Court, supra

People v. Roland, 183 Cal. App. 2d. 780, 784

People v. Amos, 181 Cal. App. 506, 508

People v. Dawson, 150 Cal. App. 2d. 119, 126

Ovalle v. Superior Court, 202 Cal. App. 2d. 760

People v. Williams, 196 Cal. App. 2d. 845

People v. Bates, 163 Cal. App. 2d. 847, 851.

harrased for the last 2 years by the police, for alleged narcotics dealings invariably he was searched, both his person and home without a warrant and found to be "clean."

The record further discloses that petitioner was known to associate with addicts and narcotic dealers.

However, in People v. Lanzitt, 70 C.A. 498, 233 p. 816, the Court held:

> "It is necessary that the defendant shall have directly participated in so much of the entire transaction that the acts which he himself committed shall alone be sufficient to make a complete offense against the law."

The officers failed to equivocally establish that the evidence introduced in Court was obtained from the petitioner.

Quite contrary, were it not for all the circumstancial evidence tending to portray petitioner as a notorious narcotic dealer, no conviction could have been had on the adduced evidence.

POINT II

Ineffective aid of Counsel.

> "It is now established that the Sixth Amendment guarantee of right to counsel, is a right fundamental and essential to a fair trial and is made obligatory on the States by the Fourteenth Amendment."
>
> Gideon v. Wainwright, 372 U.S. 359.
>
> "Moreover, effective assistance of Counsel at all stages of a State Court proceedings is a constitutional requirement which no State may disregard."
>
> Reece v. State of Georgia, 350 U.S. 85.

The reason as Mr. Justice Sutherland so wisely pointed out, in:

Powell v. Alabama, 287 U.S. 45, p. 69.

". . . .lacks both the skill and knowledge adequately to prepare his defense even though he has a perfect one. He requires the guiding hand of experienced counsel at every step of the proceeding against him."

and in: Armine v. Times, 131 F. 2d. 827, the Court held:

> "Even though an accused in a criminal trial is represented by a coterie of outstanding trial lawyers, such representation may lack vitally in satisfying "Due Process" if the assistance of counsel is ineffective."

and in: Brubaker v. Dickson, supra:

> "When inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside of the trial record, whether the defendant had a defense (1.) which was not presented, (2.) whether the omissions charged to trial counsel resulted from inadequate preparation, . . .

and in: Powell v. Alabama, supra:

People v. Avilez, 86 Cal. App. 2d. 289, 294

People v. Chesser, 29 Cal. 2d. 815

it was held that:

> "The protection guaranteed by the Sixth and Fourteenth Amendments of Federal Constitution, as well as Article I, Sec. 13, of the California Constitution is not satisfied by a "mere token" or "pro forma" appearance of an attorney.

While it will be conceded that as whole defense counsel defended the case rather well, she grossly erred in allowing your petitioner to be tried jointly with his other co-defendants when the various counts of the information, charged distinct and separate offenses not related to one another in any was or form.

POINT III

The conspiracy charge is unproven and the evidence was obtained with the aid of an unreliable informer.

Count VI of the information charges 7 overt acts of conspiracy, of which the 3rd, 6th and 7th, are pertaining to your petitioner.

In substance they charge:

"Did meet and they had a conversation."

"Did meet and they had a conversation."

"Did leave the 700 Block of East 12th St. in a motor vehicle and returned in the vehicle 15 minutes later.

It is respectfully submitted that we need not argue that:

> "No person may be subjected to be tried for committing a crime, without a specific charge against him, be made and substantiated "

In the instant case, while the charge of conspiracy was made, it is clearly established that the wording of the information does not charge a specific offense, since there is no crime for friends or acquaintances, to meet, hold a conversation or take a ride in a motor vehicle together.

The prosecution unquestionably depends on the information obtained from the informer.

Only recently the California District Court of Appeal District One, People v. Cedeno, 218 A.C.A. 229, the Court held:

> "There is no exact formula for the determination of reasonableness each case must be decided on its own facts and circumstances."
>
> People v. Ingle, 53 Cal. 2d. 407
>
> People v. Diggs, 161 Cal. App. 2d. 167, 171.

and in:

Ovalle v. Superior Court, 202 Cal. App. 2d. 760

> "The qualification of the information, given by the informer does not rise above its doubtful source, because there is more of it."
>
> People v. Vepazo, 191 Cal. App. 2d. 666
>
> People v. Blodgett, 46 Cal. 2d. 114

People v. Escobo, 185 Cal. App. 2d. 597

People v. Poole, 174 Cal. App. 2d. 57

People v. McMurray, 171 Cal. App. 2d. 178

POINT IV

Evidence obtained by interrogation without Counsel.

The record clearly establishes that immediately following the arrest, on or about April 12, 1961, petitioner was taken to the State Building for interrogation without counsel, by the arresting officers and while arrested petitioner allegedly made some statements to the officers and petitioner was not advised by the officer to have counsel present and the right toremain silent.

Escobedo v. State of Illinois, U.S. Supreme Court No. 615, October Term 1963, the Court held:

> "It is well settled that the duty of Constitutional adjudication, resting upon this Court requires that the question whether the "Due Process Clause of the 14th Amendment has been violated by admission into evidence of a coerced confession."
>
> Ashcraft v. Tennessee, 322 U.S. 143

and we cannot escape the responsibility of making our own examinatic of the record.

Spano v. United States, 360 U.S. 315

and cases cited on page 18-20, on POINT II,

and in Gideon v. Wainwright, 372 U.S. 335, 344, 345. the Court held:

> That provision of counsel in all criminal cases was "a fundamental right essential to a fair trial," and thus was made obligatory on the States by the Fourteenth Amendment.

CONCLUSIONS

The Writ shall issue, a full evidentiary hearing granted and Counsel appointed.

Dated at Tamal, California, this 9th day of December, 1964.

I certify under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Alberto Gonzales Barquera Jr.

ALBERTO GONZALES BARQUERA JR.
In Propria Persona
Box No. A-67294
Tamal, California

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA)
)
COUNTY OF MARIN) ss: AFFIDAVIT IN FORMA PAUPERIS
)

I, ALBERTO GONZALES BARQUERA JR., under penalty of perjury, deposes and says:

That he is the affiant in the above-entitled matter, that affiant is an indigent person, and a citizen of the United States and over 21 years of age, that he is unable to prepay the fees or to file a petition for a Writ of Habeas Corpus and papers in suppor thereof, or to hire counsel to prosecute said writ, that he is with out funds or anything of value with which to pay or secure the cost necessary to prosecute said writ, that affiant believes this is a good and just cause of action, and he therefore prays this Honorabl Court will permit him to proceed with a petition for a Writ of Habeas Corpus without prepaying the costs required by this Honorabl Court in such cases, and that the security for same be waived by virtue of his indigent circumstances.

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of December, 1964.

Alberto Gonzales Barquera Jr.
ALBERTO GONZALES BARQUERA JR.
Box No. A-67294
Tamal, California

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TATE OF CALIFORNIA)
)
OUNTY OF MARIN) ss: AFFIDAVIT OF VERIFICATION
)

I, ALBERTO GONZALES BARQUERA JR., under penalty of perjury, eposes and says:

That he is the petitioner in the foregoing petition for a rit of Habeas Corpus, and the affiant in the above-entitled tter, that he is a citizen of the United States and over 21 ears of age, that the statements and claims therein are true d correct to the best of his knowledge and belief and can be bstantiated by documents or established precedents, that this tition for a Writ of Habeas Corpus, consists of 34 numbered pages, cluding:

The Cover (not numbered)

Index of Statutes and Authorities

The petition for writ of habeas corpus

Affidavit in forma pauperis

Affidavit of Verification, and

Affidavit of Service by Mail.

I certify under penalty of perjury that the foregoing is true d correct.

Dated this 9th day of December, 1964.

Alberto Gonzales Barquera Jr.
ALBERTO GONZALES BARQUERA JR.
Box No. A-67294
Tamal, California

STATE OF CALIFORNIA)
)
COUNTY OF MARIN) ss: AFFIDAVIT OF SERVICE BY MAIL

I, ALBERTO GONZALES BARQUERA JR., under penalty of perjury, deposes and says:

That I am over the age of 21 years, a citizen of the United States and a resident of Marin County, at San Quentin, California, and sole party to the within action or proceeding, that I did on the 9th day of December, 1964, submit for depositing in the United States Mails at the Post Office at San Quentin with postage prepaid thereon, a true copy(s) of the within document for the following person(s), and that there is a regular communication by mail between San Quentin and these destinations:

Eleven (11) copies to: William I. Sullivan, Clerk,
Supreme Court of the
State of California
4250 State Building
San Francisco, California

One (1) copy to: Thomas C. Lynch, California
Attorney General
6000 State Building
San Francisco, California

Three (3) copies to: Superior Court Judge
County of Los Angeles
Hall of Justice
Los Angeles, California
RE: Case Nos. 292580 and 297919.

One (1) copy to: Warden, Lawrence E. Wilson
San Quentin, California

One (1) copy to: Petitioner

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of December, 1964.

Alberto Gonzales Barquera Jr.
ALBERTO GONZALES BARQUERA JR.

Q And when you looked at that balloon this morning, did you see those markings on that balloon?

A Yes, sir.

MR. ROWEN: Now, that concludes the evidence regarding Count II of the Information, your Honor.

THE COURT: All right, thank you.

MR. ROWEN: And also the evidence regarding Overt Act No. 2.

THE COURT: All right.

MR. ROWEN: The officer is now about to start on the evidence regarding Count III, regarding a transaction between Salvador Gomez and Alberto Barquera, Jr., as alleged in Count III of the Information, and also it applies to the Overt Act No. 3 that is alleged in Count VI of the Information.

THE COURT: Go ahead.

Q BY MR. ROWEN: Officer, directing your attention to March 3, 1961, some time on that date did you go back to the Texas Club?

A Yes, sir, I did.

Q At that time were there fellow officers with you? Were you under surveillance?

A Yes, sir.

Q Who were the officers at that time?

A Agents Kent and Leavey, Agent Lampe.

Q Did you go into the Texas Club?

A No, sir.

Q What time of the day or night did you arrive there?

A Approximately 1:40 p.m.

Q On that occasion did you meet the Defendant Salvador Gomez?

A Yes, sir.

Q Where did you meet the Defendant Salvador Gomez?

A In the parking lot at the rear of the Texas bar.

Q Had you been there before 1:40 p.m.?

A No, sir.

Q All right. Tell us what happened on that occasion?

A I parked the state vehicle on the 700 block East 12th Street, which is adjacent to the parking lot at the rear of the Texas Club; got out of the state vehicle and walked to where Salvador Gomez was standing in the parking lot.

I asked Salvador Gomez if he could get me a half a piece and he said, "No, I don't have it."

I said, "Well, can you at least get me a quarter?" And he said, "Yes."

Q Now, the phrase, "half a piece," what does that mean?

A Half ounce measurement.

Q Half an ounce of heroin?

A Heroin.

Q All right. Then he said, "No." And you asked him, "Could you at least get me a quarter"?

A I then asked him if he could at least get me a quarter. He said, "Yes. Wait for Nolo."

Q And a quarter is what, a quarter ounce?

A Yes, sir.

Q What did he tell you after you asked him if he could get you a quarter?

A He said, "Yes, but you'll have to wait for Nolo. He'll be back in a minute."

I then told him I would wait in this car that I was driving. And he said, "Okay. The Chevy over there?" And I said, "Yes."

I returned to the state vehicle and entered it; waited. Approximately five minutes later I observed Alberto Barquera.

Q Do you see Alberto Barquera, Jr., in the courtroom?

A Yes, sir.

Q And which is he?

A The defendant next to counsel.

Q Next to Mrs. Chandler?

A Yes.

MR. ROWEN: Mr. Alberto Barquera stand up.

Q Is that Alberto Barquera, Jr?

A Yes, sir.

MR. ROWEN: All right, you can sit down.

THE WITNESS: I observed Salvador Gomez and Alberto Barquera conversing in the parking lot and looking in my direction.

Q BY MR. ROWEN: All right. What happened then?

A Alberto Barquera by himself, walking by himself, came towards the state vehicle, entered, sat in the front seat. And he said, "Hi, Tony. How are you?"

Q Had you ever met Alberto Barquera before?

A Never.

Q Did he introduce himself by any name?

A I asked him, "Are you Nolo?" And he said, "Yes, I am."

Q What happened then?

A He then directed me to drive into the alley.

Q Did you drive the car in the alley?

A Yes, sir. I proceeded south in the alley.

Q Was there any conversation while you drove in the alley?

A Yes. He asked me, "Are you from El Paso?" And I said, "No, I'm from La Puente right now."

He said, "How much do you want?" I said, "A quarter." I asked him, "How much will it be?" And he said, "Seventy."

THE COURT: Seventy?

THE WITNESS: Seventy, yes.

Q BY MR. ROWEN: Seven oh?

A Seven oh.

Q All right, go ahead.

A At the south alley of the 700 block of Pico Street, the south entrance to the alley, he asked for the money. At this time I gave him $70.00 from state funds and he said, "Wait."

THE COURT: Now, let me get this straight. You gave him $70.00 for how much powder?

THE WITNESS: A quarter ounce.

THE COURT: One quarter ounce?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: At this location he instructed me to park. He got out of the state vehicle and I observed him to walk where the storm drain is situated at the corner of the building, and from a clump of grass that was growing at this location he reached down, retrieved a balloon, and came back to the state vehicle. At this time he handed me a yellow colored balloon.

Q BY MR. ROWEN: Did you take the balloon into your possession?

A Yes, I took the balloon and I asked him --

counsel, and the interpreter are here?

MR. DUNCAN: So stipulated.

MRS. CHANDLER: So stipulated.

THE COURT: All right, go ahead.

Now we are on Count V and Overt Acts 6 and 7?

MR. ROWEN: That is correct.

Q Officer, directing your attention to March 21, 1961, did you some time on that day go back to the Texas Club?

A Yes, sir, I did.

Q What time didyou first go there?

A Oh, approximately 5 after 2:00, 2:00 o'clock, 2:00 p.m.

Q And when you went back to the Texas Club on March 21, 1961, did you meet or see the Defendant Salvador Gomez?

A Yes, sir, I did.

Q All right. And did you talk with him then?

A Yes, sir, I did.

Q First of all, where did you meet him?'

A He was the occupant in a vehicle that pulled up paralle1 to the -- pulled up alongside the state vehicle that I had parked on the 700 block east Pico.

Q Now, were you under surveillance by fellow members of the State Narcotic Bureau at that time?

A Yes.

Q And who were they?

A They were Agents Wells, Kent, Leavey, Narro.

Q And you were parked on 12th Street, 7th Street--where were you parked?

A 700 block East 12th Street -- no -- yes, yes.

Q All right. And were you in a state police car, were you?

A Yes, sir.

Q State vehicle. And just to repeat, now, the Defendant Salvador Gomez drove up in a car?

A Yes, sir.

Q Was he in an automobile by himself or were there others in the car?

A There were others in the car.

Q And how many others were there in the car?

A One.

Q Was it a man or a woman?

A A man.

Q Do you see that person in the courtroom today?

A Yes.

Q Who is that?

A Alberto Barquera, Jr.

Q Known to you as "Nolo," too?

A Yes, sir.

Q What happened at this occasion?

A Well, Alberto Barquera, Jr., was driving, Salvador Gomez was a passenger in the front seat. They pulled up alongside of me. Salvador asked me, "What do you want?"

THE COURT: Wait a minute. You pulled up alongside of whom?

THE WITNESS: They pulled up alongside of me on the 700 block of 12th Street.

THE COURT: All right. Now, who pulled up?

THE WITNESS: Salvador Gomez and Alberto Barquera.

THE COURT: All right.

THE WITNESS: Alberto Barquera was driving. They pulled up alongside the state vehicle, and Salvador Gomez asked me, "What do you want?" And I said, "A quarter." And he said, "Okay, wait here."

Q BY MR. ROWEN: Who said, "Okay, wait here"?

A Salvador Gomez.

Q Told you to wait there?

A Yes.

Q Did Gomez get out of the car when he asked you what you wanted?

A No.

Q After you told him "A quarter," he told you to "Wait here," was he out of the car then or was he still in the car?

A No. They were both in the vehicle.

Q Were you in your car?

A No, I was on the street.

Q When you say "on the street --"

A I was standing on the street.

Q All right. After they told you to "wait here," what did they do then?

A They drove away heading south in the alley.

Oh, approximately 10, 15 minutes later the car returned and parked on the 700 block of 12th Street next to San Pedro, 700 block East.

MR. ROWEN: All right. Now, just a moment. I want to direct the Court's attention to Overt Act No. 6.

THE COURT: Yes.

MR. ROWEN: Now, the officer has testified to the circumstances regarding Overt Act No. 6; that is, the conversation between Alberto Barquera, Jr., and Salvador Gomez.

THE COURT: All right.

MR. ROWEN: And the officer has just testified to the Overt Act No. 7; that is, that Alberto Barquera, Jr., and Salvador Gomez did leave the 700 block of East 12th Street in a motor vehicle and return to the location later, 15 minutes later. So we have taken all of the Overt Acts alleged in Count VI, your Honor.

THE COURT: All right.

Q BY MR. ROWEN: Now, after they returned in

the car, where did they park?

A They parked on the 700 block East 12th Street next to San Pedro.

Q Where were you at that time?

A I was still in the state vehicle, which was parked further east.

Q Okay. And then what happened?

A Upon parking their vehicle, Salvador Gomez and Alberto Barquera got out of their vehicle.

Q They both got out of their car?

A Yes.

Q Then what did they do?

A Both entered the Texas bar through the front door.

Q Okay. What did you do?

A I remained in the state vehicle. Shortly afterward, Salvador Gomez comes out to the rear door.

Q The rear door of the Texas bar?

A Of the Texas bar. And motions for me to join him.

Q Did you get out of your car then?

A Yes, I did.

Q Did you go into the Texas bar?

A No, I met him at the rear doorway.

Q Who did you meet at the rear doorway?

A Salvador Gomez.

Q Did you have a conversation with Salvador Gomez at that time?

A Yes.

Q What was said?

A He said, "Go into the women's toilet; Nolo is there."

Q All right. What did you say?

A I said, "Okay." I walked into the women's restroom.

Q Inside the Texas bar?

A Yes, sir.

Q All right. Tell us what happened inside.

A Alberto Barquera was inside. He met me at the door. At this time he said, "Have you got the money?" I said, "Yes." I said, "How much is it?" He said, "Seventy."

He then handed me a balloon and I handed him $70.00 from state funds.

Q Was there any conversation?

A Yes.

Q Tell us about that.

A I asked him if I could still get the five pieces, and he said, "Yes, whenever you are ready, just bring the money in. We can do it."

Q What else?

A I told him that I would see about it.